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No. 04-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY GRUBBS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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As the petition demonstrates (at 15-20), there is a five-to-one circuit conflict, acknowledged by courts on both sides of the issue, on the question presented here —whether suppression is required when a search is conducted under an anticipatory warrant *after* the triggering condition is satisfied, but the triggering condition is not described either in the warrant or in a supporting affidavit that is both incorporated into the warrant and presented to the person whose property is being searched. Respondent does not deny the existence of the conflict. Instead, he contends (Br. in Opp. 3-5) that the conflict need not be resolved. He also contends that the decision below is correct (*id.* at 7-9) and that the government overstates the importance of

the question presented (*id.* at 5-6). Each of these contentions is mistaken.

A. *Groh* v. *Ramirez* Will Have No Effect On The Circuit Conflict

1. Respondent contends (Br. in Opp. 3-5) that it would be premature to resolve the circuit conflict. He argues that the lower courts should be given an opportunity to consider the effect on the question presented here of *Groh* v. *Ramirez*, 540 U.S. 551 (2004), which he characterizes as holding that "a warrant defective on its face cannot be cured by an affidavit that neither was incorporated into the warrant nor accompanied it" (Br. in Opp. 3). The cases on which the government relies, according to respondent, "have limited validity," because of their "inconsistency with *Groh*'s treatment of curing a warrant defect by specific incorporation of an accompanying affidavit." *Id.* at 4.

Respondent misperceives the issue in this case. The question presented is not, as respondent frames it, "[w]hether a facially invalid anticipatory search warrant may be rendered valid by information contained in an affidavit that is not presented to the persons whose property is to be searched." Br. in Opp. i. The question is not one of curing a concededly invalid warrant, but whether an anticipatory search warrant *is in fact* facially invalid in the first place solely because it does not specify the triggering event.

Respondent likewise misperceives the nature of the circuit conflict. The decisions of the Second, Sixth, Seventh, Eighth, and Tenth Circuits cited in the petition (at 15-18) did not hold that the warrant at issue was invalid but cured, much less that it was invalid but cured for a reason rejected in *Groh*. The decisions held, correctly, that an anticipatory warrant is *not* invalid

merely because it does not specify the triggering event.[1] In those five circuits, the Fourth Amendment has been interpreted to require only that the triggering event be described in the supporting affidavit presented to the magistrate judge and that the warrant be executed after the triggering event occurs. See Pet. 15-18. Since those circuits hold that a warrant like the one at issue here is *not* invalid, *Groh*'s discussion of what is necessary to cure a warrant that *is* invalid has no relevance to their holdings.[2]

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[1] See *United States* v. *Dennis*, 115 F.3d 524, 529 (7th Cir. 1997) (rejecting argument that "the anticipatory warrant issued in this case is invalid because it failed to list [all] conditions [precedent to execution] on its face"); *United States* v. *Moetamedi*, 46 F.3d 225, 229 (2d Cir. 1995) ("an anticipatory warrant is valid even though it does not state on its face the conditions precedent for its execution"); *United States* v. *Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993) (rejecting argument that "the warrant was invalid because it did not expressly condition the search upon the controlled delivery"); *United States* v. *Rey*, 923 F.2d 1217, 1221 (6th Cir. 1991) ("the warrant was not defective because it did not expressly specify that the search could be executed only after the controlled delivery had been made").

[2] Respondent quotes *Groh*'s observation that "most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." Br. in Opp. 3-4 (quoting 540 U.S. at 557-558). Respondent then notes (*id.* at 4) that the Court cited, for that proposition, the Ninth Circuit's decision in *United States* v. *McGrew*, 122 F.3d 847 (1997). But the Court cited decisions of the Sixth, Eighth, and Tenth Circuits as well, 540 U.S. at 558, and each of those circuits has also held that an anticipatory warrant is not invalid merely because it fails to include the triggering condition, see Pet. 15-18. That this Court relied upon the law in those circuits is further confirmation that *Groh* will not occasion a "reconsideration" (Br. in Opp. 4) by the courts that have rejected the Ninth Circuit's unique rule for anticipatory warrants.

2. *Groh* also provides no support for the Ninth Circuit's rule that an anticipatory warrant is facially invalid if it does not describe the triggering event. The warrant in *Groh* was held to be facially invalid because it omitted information "unambiguously" required by the Fourth Amendment: a particular description of the "things to be seized." 540 U.S. at 557 (quoting U.S. Const. Amend. IV). No such claim could be made about the warrant here. See Pet. App. 49a-51a (listing 16 categories of "items to be seized"). And while the decision below "relied" on *Groh* (Br. in Opp. 3), it did not (and could not) do so for the proposition that a triggering condition is subject to the Fourth Amendment's particularity requirement. See Pet. App. 10-12a, 14a-15a. The warrant in *Groh* was not anticipatory, and the Court did not address the requirements for an anticipatory warrant. Indeed, the Ninth Circuit explicitly acknowledged that "[t]he *Groh* Court considered a warrant that 'failed to identify any of the items' to be seized." *Id.* at 11a (quoting *Groh*, 540 U.S. at 554).[3]

If anything, *Groh* casts doubt on the Ninth Circuit's rule, because it recognizes that the Warrant Clause has "four[] requirement[s]," 540 U.S. at 557, and a requirement that the triggering condition be specified in the warrant is not one of them. Instead, as explained in the petition (at 10-11), the triggering condition implicates different requirements of the Fourth Amendment: the requirements that the warrant be based "upon probable

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[3] Like the one in *Groh*, the warrant in the Sixth Circuit case on which respondent relies (Br. in Opp. 5) was held to violate the Fourth Amendment's particularity requirement because it did not specify the items to be seized. See *Baranski* v. *Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco & Firearms*, 401 F.3d 419, 428-431 (2005).

cause" and that it be "supported by Oath or affirmation." That is why a description of the triggering condition in the supporting affidavit and a finding by the magistrate judge that it supports probable cause are constitutionally sufficient.

B. The Ninth Circuit's Decision Is Incorrect

Respondent makes a number of arguments (Br. in Opp. 7-9) in defense of the Ninth Circuit's rule. Since the rule has been rejected by five circuits, however, his arguments would not provide a reason to deny certiorari even if they had merit. In any event, each argument lacks merit.

Respondent contends that anticipatory warrants "were unknown to those who framed and ratified the Bill of Rights," and that it is therefore "unsurprising that the Fourth Amendment [sic] text does not address the issue." Br. in Opp. 8 n.5. The Ninth Circuit's rule is correct, according to respondent, because it "enforc[es] the fourth amendment interests the warrant requirement is designed to protect in the modern context of anticipatory warrants." *Id.* at 9. Regardless of whether anticipatory warrants were used in the late eighteenth century, however, the general question of "when [a] search may first take place," *United States* v. *Hotal*, 143 F.3d 1223, 1227 (9th Cir. 1998), can hardly be said to have been "unknown" to the Founding generation (Br. in Opp. 8 n.5) or to have become relevant only in "modern" times (*id.* at 9). Yet those who framed and ratified the Fourth Amendment determined that it was only "the place to be searched" and "the persons or things to be seized" that must be described with particularity in a warrant. U.S. Const. Amend. IV.

Respondent argues that this Court has recognized that "factors other than those specifically listed in the

Fourth Amendment's text must appear on the face of the warrant for it to be constitutionally valid." Br. in Opp. 8. He cites *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), for the proposition that "a warrant is constitutionally invalid if it is not signed by a 'neutral and detached' magistrate." Br. in Opp. 8. But that is not the holding of the case. *Coolidge* holds that a search cannot be justified by a warrant if the warrant was "not *issued* by a 'neutral and detached magistrate.'" 403 U.S. at 449 (emphasis added). It does not hold that a warrant that *is* issued by a neutral and detached magistrate is nevertheless unconstitutional if the magistrate's signature does not "appear on the face of the warrant." Br. in Opp. 8. The requirement of a neutral and detached magistrate has nothing to do with the Fourth Amendment's particularity requirement. Rather, it emerges from the warrant requirement itself: "[i]nherent in the concept of a warrant is its issuance by a 'neutral and detached magistrate.'" *United States* v. *United States District Court*, 407 U.S. 297, 316 (1972). See also *Illinois* v. *Gates*, 462 U.S. 213, 240 (1983) ("The essential protection of the warrant requirement of the Fourth Amendment, as stated in *Johnson* v. *United States*, 333 U.S. 10 (1948), is in 'requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Id.*, at 13-14."); *Shadwick* v. *City of Tampa*, 407 U.S. 345, 350 (1972).[4]

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[4] Respondent also cites the Sixth Circuit's decision in *United States* v. *Bailey*, 628 F.2d 938 (1980), for the proposition that "a search warrant is constitutionally invalid if it does not contain a termination date." Br. in Opp. 9. Like *Coolidge*, however, *Bailey*

Respondent also asserts that the warrant in this case was "invalid on its face" (Br. in Opp. 7) because it mistakenly stated that the property to be seized "is now concealed" in respondent's home (Pet. App. 47a). He then argues that the defect was not cured by the affidavit, because it was not presented to respondent at the time of the search, and that suppression was therefore required. Br. in Opp. 7. But the fact that the warrant stated that the property "is now concealed" at respondent's home, rather than that it "will be concealed" there when the triggering event occurs, does not render the warrant facially invalid. At most, that fact—in combination with the fact that the warrant authorized a search *from the date of issuance* until 10 days thereafter, without requiring that the search take place after the triggering event—makes the warrant overbroad as to time. See Pet. 13. As explained in the petition (at 13-15), suppression is not an appropriate remedy for that type of overbreadth when, as in this case, the search *in fact* occurred *after* the triggering event.

C. The Petition Does Not Overstate The Importance Of The Question Presented

Respondent contends that the petition "overstates the recurring importance of the issue presented to the administration of the criminal justice system." Br. in Opp. 5. He argues that suppression can be avoided in the Ninth Circuit if "law enforcement agencies [are made] aware of the rule" that "the triggering event

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was not based on the Fourth Amendment's particularity requirement. It held that monitoring the location of property with a beeper for "an indefinite period of time" violates the Fourth Amendment because it is "an unreasonable search." 628 F.2d at 945.

must be set forth in the warrant itself[] or in an affidavit that is incorporated by reference into the warrant and that [is] attached and accompan[ies] the officers when the warrant is executed." *Ibid.* That argument ignores the costs to the criminal justice system as a whole of a rule that creates incentives to rely on warrantless searches based on exigent circumstances, rather than searches pursuant to a warrant tailored to contingencies and justified to a magistrate. See Pet. 21. The argument also ignores the unavoidable costs of the Ninth Circuit's rule. The petition acknowledges (at 21) that the government could avoid suppression in some cases by training federal investigators and prosecutors to do what the Ninth Circuit requires. Nevertheless, the government pointed out, training at the federal level would not eliminate cases resulting in suppression; rather, there would still be a class of cases in which the government had to go to trial without the most probative evidence, agree to a guilty plea on terms highly favorable to the defendant, or, as is likely in this case, forgo prosecution entirely. Pet. 20-22.

The petition (at 21-22) identifies two reasons why suppression under the Ninth Circuit's rule could not be avoided altogether, and respondent offers no answer to either of them. First, federal prosecutions often result from state or local investigations, and there is no way to ensure that all of the state and local law enforcement agencies and prosecutor's offices in the Ninth Circuit will adhere to a rule that is not applicable in the courts where their cases are ordinarily brought. See Pet. 21-22. Second, despite their best efforts to comply with all requirements in what is already a complex area of law, investigators and prosecutors sometimes make mistakes when they apply for a search warrant, parti-

cularly since that process, even for anticipatory warrants, often occurs "in the midst and haste of a criminal investigation." *Gates*, 462 U.S. at 235 (quoting *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)). It is one thing to suppress evidence when, as in *Groh*, an officer fails to comply with a clear and textually "unambiguous[]" requirement of the Fourth Amendment, 540 U.S. at 557; it is quite another to saddle the government with a rule that will sometimes result in suppression when the rule has no basis in the Constitution. See Pet. 22. For these reasons, the rule in the Ninth Circuit, where nearly one quarter of federal criminal cases are brought (see Pet. 20), does have "recurring importance * * * to the administration of the criminal justice system" (Br. in Opp. 5).

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

JULY 2005